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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

ORIGINAL

DOCKET NO. S-20906A-14-0063

In the matter of:

CONCORDIA FINANCING COMPANY,
LTD, a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY
SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA
WANZEK, husband and wife,

Respondents.

SECURITIES DIVISION'S RESPONSE TO
MOTION TO DISMISS BY ALL
RESPONDENTS

Arizona Corporation Commission

DOCKETED

MAY 09 2014

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1 The Securities Division (“Division”) of the Arizona Corporation Commission
2 (“Commission”) respectfully requests that this Tribunal deny Respondents’ Motion to Dismiss
3 (“Motion”)¹ in its entirety for the following reasons:

4 *First*, the statute of limitations defense in A.R.S. § 44-2004 does not apply to state agencies
5 when they pursue an action in the public interest, as the Division has done here. Controlling
6 Arizona precedent and the plain text of A.R.S. § 44-2004 confirm that the limitations periods in
7 that statute do not apply. Respondents have no statute of limitations defense.

8 *Second*, the Division’s Notice of Opportunity for a Hearing (“Notice”) fully satisfies the
9 notice pleading standard applicable to this proceeding. Contrary to Respondents’ misguided
10 arguments, Rule 9(b) of the Arizona Rules of Civil Procedure has no application to this
11 administrative action.

12 *Third*, whether the investments at issue are “securities” is a question to be decided at the
13 hearing, not on a motion to dismiss. The Division’s Notice alleges facts relevant to whether the
14 investments are securities. Respondents dispute those factual allegations. Because the parties
15 dispute facts relevant to the legal issue of whether the Servicing Agreements are securities, that
16 issue cannot be decided on a motion to dismiss. In addition, the applicable procedural rules do not
17 require the Division to present at this stage all its evidence that the investments are securities. That
18 is one of the issues for the hearing.

19 *Fourth*, Mrs. Wanzek should not be dismissed based on her counsel’s conclusory assertion
20 that no marital community exists. Mrs. Wanzek says she moved to Florida in 2010. If she did, that
21 fact does nothing to eliminate or reduce the liability of her and Mr. Wanzek’s marital community
22 for the alleged securities laws violations he committed when they both lived in Arizona prior to
23
24

25 ¹ The Motion was filed by Respondents ER Financial & Advisory Services, LLC (“ERF”), Lance
26 Michael Bersch (“Bersch”), David John Wanzek (“Wanzek”) and Linda Wanzek (“Mrs. Wanzek”).
On April 25, 2014, Respondent Concordia Financing Company, Ltd. (“Concordia”) filed its
Joinder to Motion to Dismiss [sic].

1 2010. Moreover, Mrs. Wanzek's affidavit is conspicuously silent regarding Mr. Wanzek's
2 residence, which the Division's Notice alleges is in Arizona.

3 Public records support the Division's allegations that Mr. and Mrs. Wanzek continue to
4 have a marital community in Arizona. The Mohave County Assessor's Office lists Mr. and Mrs.
5 Wanzek as the owners of real property in Lake Havasu City, Arizona as "CPWRS," which is an
6 acronym for "Community Property With Right of Survivorship." Mr. Wanzek recently renewed
7 his CPA license in Arizona by certifying under penalty of perjury that he resides in Lake Havasu
8 City, Arizona.

9 Assuming the truth of the Notice's factual allegations and crediting the Division with all
10 reasonable inferences therefrom, as this Tribunal must do in deciding the Motion, Mrs. Wanzek
11 cannot be dismissed. At a minimum, disputed issues of material fact exist as to the continuing
12 existence and liability of Mr. and Mrs. Wanzek's Arizona marital community that preclude
13 dismissal. Again, the resolution of those factual disputes is the purpose of the hearing. It is
14 inappropriate and would be error to adjudicate disputed factual issues on a motion to dismiss, as
15 Respondents want the Tribunal to do.

16 Respondents' Motion should be denied in its entirety.

17 MEMORANDUM OF POINTS AND AUTHORITIES

18 I. STANDARD OF REVIEW

19 "[M]otions to dismiss for failure to state a claim are not favored in Arizona." *Acker v. CSO*
20 *Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997). When adjudicating a motion to
21 dismiss, courts must assume the truth of the well-pled factual allegations and "indulge all
22 reasonable inferences therefrom" in the plaintiff's favor. *Cullen v. Auto-Owners Ins. Co.*, 218
23 Ariz. 417, 419 ¶ 7, 189 P.3d 344, 346 (2008). The motion should not be granted unless it appears
24 that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under
25 the claim presented. *Id.* at 419 ¶¶ 7-12, 189 P.3d at 346-47 (rejecting the standard established by
26 the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *Dressler*

1 v. *Morrison*, 212 Ariz. 279, 281 ¶ 11, 130 P.3d 978, 980 (2006) (reversing order by trial court
2 granting motion to dismiss).

3 In other words, this Tribunal may only grant Respondents' Motion if it is certain the
4 Division cannot prove the facts alleged in its Notice entitling the Division to relief.

5 **II. RESPONDENTS' "PASSAGE OF TIME" ARGUMENTS IGNORE THE**
6 **CONTROLLING LAW.**

7 **A. *Controlling Arizona Precedent Defeats Respondents' Statute of Limitations***
8 ***Argument.***

9 Respondents argue that the statutes of limitation codified at A.R.S. § 44-2004 of the
10 Arizona Securities Act ("ASA") require dismissal of the Notice. In support of that argument, their
11 Motion cites several statute of limitations opinions rendered over the course of 209 years from a
12 variety of jurisdictions, but none are from Arizona.

13 While Respondents thought it appropriate to present all those non-binding, non-Arizona
14 opinions, they did not think it was appropriate to at least reference in their Motion the controlling
15 Arizona precedent: *Trimble v. American Savings Life Insurance Company*, 152 Ariz. 548, 733 P.2d
16 1131 (App. 1986) (state agencies are "immune from the statute of limitations defense" in § 44-
17 2004 when they pursue a an action in the public interest).²

18 In *Trimble*, the Arizona Court of Appeals specifically addressed the application of A.R.S. §
19 44-2004 to claims asserted by, among other agencies, the Arizona Corporation Commission for
20 violations of the ASA. 152 Ariz. at 555-56, 733 P.2d at 1138-39. *Trimble* was an enforcement
21

22 ² In its Joinder to Motion to Dimiss [*sic*], Respondent Concordia sheepishly "acknowledges the
23 existence" of *Trimble*. Concordia then dismisses *Trimble* as "of limited application" without
24 providing any explanation for that characterization of *Trimble*'s precedential value. Concordia's
25 sheepish reference to *Trimble* in its Joinder came after correspondence from the Division to
26 counsel for Respondents ERF, Bersch, Wanzek and Mrs. Wanzek regarding their failure to cite
Trimble as Arizona authority that is directly adverse to their statute of limitations argument. See
ER 3.3(a)(2), Candor Toward the Tribunal, Ariz. Rules of Professional Conduct ("A lawyer shall
not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction
known to the lawyer to be directly adverse to the position of the client....").

1 action brought jointly by the Commission, the Director of Securities and the Director of Insurance
2 to remedy alleged securities and insurance fraud. *Id.* at 550, 733 P.2d at 1133.

3 The Court of Appeals held that state agencies are “immune from the statute of limitations
4 defense” in § 44-2004 when they pursue an action in the public interest, as the Division has done
5 here. *Id.* at 555-56, 733 P.2d at 1138-39. The Court reasoned that when a violation of the ASA
6 occurs, “[T]he corrective actions taken by the state [through its agencies] benefit the public as a
7 whole. The public interest is served by the cessation of illegal and fraudulent acts. Requiring the
8 [violators] to make restitution to the victims has a deterrent effect, which also serves the public
9 interest.” *Id.* at 555-56, 733 P.2d at 1138-39.

10 *Trimble* also disposes of Respondents’ arguments regarding the statute of limitations
11 applicable to criminal felony prosecutions, A.R.S. § 13-107. *Trimble* further held:

12
13 Statutes of limitation in public enforcement actions as opposed to criminal
14 prosecutions do not run against the state “unless the legislature has expressly
15 and definitely declared that they do.” Unless the legislature expressly declares
that a statute of limitations bars an action brought for the public benefit we
will not give it effect.

16 *Id.* at 556, 733 P.2d at 1139 (quoting *City of Bisbee v. Cochise County*, 52 Ariz. 1, 10, 78 P.2d 982,
17 985 (1938)).

18 A.R.S. § 13-107 is an example where the Legislature has “expressly and definitely
19 declared” that a statute of limitations will run against the State in criminal felony prosecutions.
20 *Trimble* found no such declaration by the Legislature with respect to civil enforcement actions to
21 correct and deter securities law violations. *See id.* at 556, 733 P.2d at 1139.

22 *Trimble* was decided in 1986. The Legislature amended A.R.S. § 44-2004 in 1996. *See*
23 Laws 1996, Ch. 197, § 7. The 1996 Legislature did not write anything into the statute to make it
24 applicable to public enforcement actions, despite the *Trimble* court’s holding that “[s]tatutes of
25 limitation in public enforcement actions . . . do not run against the state ‘unless the legislature has
26 expressly and definitely declared that they do.’” *Trimble*, 152 Ariz. at 556, 733 P.2d at 1139.

1 Accordingly, there can be no doubt that the decision of the Court of Appeals in *Trimble* applies with
2 full force to this proceeding.

3 In summary, *Trimble* squarely holds that the statute of limitations defense in A.R.S. § 44-
4 2004 does not apply to civil enforcement actions like this one. *Trimble* is on point, controlling and
5 directly adverse to Respondents' statute of limitations argument. This Tribunal should follow
6 *Trimble* and deny Respondents' Motion.

7 ***B. By Its Plain Text, A.R.S. § 44-2004 Expressly Does Not Apply To This***
8 ***Enforcement Action.***

9 In addition to omitting to disclose *Trimble*, the Motion omits to supply the text of the very
10 statute upon which Respondents rely, A.R.S. § 44-2004. A plain reading of that statute confirms
11 that it does not apply to civil enforcement proceedings.

12 A.R.S. § 44-2004 provides in relevant part:

13 A. No civil action shall be maintained ***under this article*** to enforce any
14 liability based on a violation of § 44-1841 or 44-1842 unless brought within
15 one year after the violation occurs.

16 B. ... [N]o civil action shall be brought ***under this article*** to enforce any
17 liability based on a violation of article 13 of this chapter [which includes § 44-
18 1991] unless brought within two years after discovery of the fraudulent
practice on which the liability is based, or after the discovery should have
been made by the exercise of reasonable diligence. (Emphases added).

19 "[T]his article" to which § 44-2004 refers is Article 14 of the ASA, which is designated
20 "Civil Remedies and Liabilities." Thus, the limitations periods stated in § 44-2004(A) and (B)
21 apply only to actions brought under Article 14.

22 The Division is not bringing this enforcement action under Article 14. Rather, it is bringing
23 it under Article 16, which is designated "Enforcement."

24 Thus, by its plain terms, § 44-2004 does not apply because this is not an action under
25 Article 14.

C. Respondents' Reliance On Federal Authorities Is Misplaced.

Instead of supplying the controlling Arizona authorities, Respondents quote a federal statute of limitations, 28 U.S.C. § 2462, which applies to actions by the Securities and Exchange Commission ("S.E.C."). Respondents also discuss federal case law applying 28 U.S.C. § 2462 and argue, "There is no reason the [Commission] should be able to tread where the S.E.C. cannot." Motion at 6:8-9. The federal authorities are inapplicable and Respondents' reasoning, which ignores basic concepts of federalism, is mistaken.

"In interpreting a state statutory scheme such as the ASA, [Arizona Courts] will give less weight and not necessarily defer to federal case law that construes a parallel federal statute when the state and federal statutory provisions or their underlying policies materially differ." *Sell v. Gama*, 231 Ariz. 323, 327 ¶ 18, 295 P.3d 491, 495 (2013).

Here, the Arizona and federal statutory provisions on which Respondents rely materially differ. As set forth above, by its plain terms, § 44-2004 is limited to actions brought under Article 14 of the ASA and does not apply to enforcement proceedings by the Division under Article 16.

Moreover, 28 U.S.C. § 2462 is not a "parallel federal statute" to § 44-2004 or any other securities statute. Rather, 28 U.S.C. § 2462 "is not specific ... to securities law; it governs many penalty provisions throughout the U.S. Code." *Gabelli v. S.E.C.*, --- U.S. ---, 133 S. Ct. 1216, 1219 (2013).

Further, Respondents fail to note that the five-year limitations period in 28 U.S.C. § 2462 applies only to civil penalties, and does not prevent a finding of liability or an award of other kinds of remedies to the S.E.C. *Gabelli*, 133 S. Ct. at 1220 n. 1; *S.E.C. v. Amerindo Inv. Advisers, Inc.*, 2014 WL 405339 at *9 (S.D.N.Y. Feb. 3, 2014); *see also S.E.C. v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 288 n. 8 (2d Cir.2013) (noting that disgorgement is not a penalty and allowing disgorgement even where civil penalties were barred by the statute of limitations).

In short, the federal authorities Respondents urge the Tribunal to follow are inapplicable and do not provide a basis on which to dismiss the Notice.

D. Respondents' Due Process Argument Fails.

Perhaps in recognition of *Trimble's* controlling authority and because their statute of limitations arguments ignore the plain text of the ASA, Respondents make a fallback Due Process argument. They complain, "[T]he events alleged in the Notice are so stale that it would not be fair to proceed." Motion at 7:24-25. This argument ignores that the Notice alleges they engaged in unlawful sales of securities in 2009 and sought investors' approval to amend the instruments at issue as recently as December 2011. See Notice at ¶¶ 28 and 34.

Respondents cite one West Virginia case to support their "fairness" argument, *State ex rel. Fillinger v. Rhodes*, 741 S.E.2d 118 (W.Va. 2013). That case is inapposite, however. It involved a nurse who was the subject of two complaints alleging that she unlawfully obtained prescription drugs for her personal use from the hospitals where she worked. See *Fillinger*, 741 S.E.2d at 120-21. The nurse denied the allegations and demanded a hearing before the West Virginia Board of Examiners for Registered Nurses. *Id.* at 120. But the Board never provided the nurse a hearing. So she petitioned the court, which held that the Board effectively denied her an opportunity to be heard. *Id.* at 125. The Board had unilaterally continued every scheduled hearing date the day before the hearing was to occur without any adequate explanation for the last-minute continuances. *Id.* at 125. The Board also had never responded to the nurse's pre-hearing requests to be informed of the name of the assigned hearing examiner, the names of the witnesses the Board intended to call, and the exhibits the Board planned to use. *Id.* at 125.

The facts of *Fillinger* bear no resemblance to this case. *Fillinger* provides no authority upon which to dismiss the pending allegations of securities fraud and registration violations against Respondents. Unlike the nurse in *Fillinger*, Respondents are seeking to avoid, rather than receive, an opportunity to be heard.

E. Respondents Are In No Position To Advocate How Commission Resources Should Be Used.

Respondents argue that the Commission has limited resources, which is true. Respondents then attempt to exploit those limitations by arguing that the Commission should not spend any resources to prosecute this enforcement action against them.

Respondents flouted and ignored the Securities Act's anti-fraud and registration requirements, and the Commission's securities regulations, for nearly two decades. Respondents are in no position now to argue about how the Commission should spend its resources.

III. THE DIVISION'S NOTICE FULLY SATISFIES THE APPLICABLE PLEADING STANDARD.

Respondents argue that the Division's Notice does not plead with specificity as to each Respondent's conduct and that it should be dismissed pursuant to Rule 9(b), Arizona Rules of Civil Procedure. Respondents are simply wrong in arguing that Rule 9(b)'s pleading standard applies to this administrative case.

A. The Rules Of Practice And Procedure Before The Commission Govern This Action.

Rule R14-3-101A of the Arizona Administrative Code states the Commission's Rules of Practice and Procedure (hereafter referred to as the "Commission's Rules") govern in all cases before the Commission, including cases arising out of Title 44. Commission Rule R14-3-101A goes on to state the Arizona Rules of Civil Procedure apply *only if* procedures are not otherwise set forth by law, the Commission's rules, or by regulations or orders of the Commission.

Division-specific procedures governing securities investigations, examinations and administrative proceedings are found under Article 3 of the Commission's Rules. Commission Rule R14-4-306 is a specific procedure governing Division notices regarding hearings. Thus, there is absolutely no reason to look to the Arizona Rules of Civil Procedure.³

³ If Article 3 of the Commission's Rules were for some reason deemed insufficient, Article 1 of the Commission's Rules also contains procedures regarding administrative proceedings before the Commission. And even if the Commission's Rules did not have a procedure regarding pleadings,

1 Commission Rule R14-4-306 is a notice pleading rule. It does not require that the Division
2 identify each and every specific instance of misconduct by specific perpetrator, victim, date, time
3 and location. As a notice pleading rule, all that is required is that the Division notify the opposing
4 parties of the nature of the claim. This is entirely consistent with § 41-1061(A)(4) of the AAPA
5 which states that the notice to be given requires “[a] short and plain statement of the matters
6 asserted.” It is also consistent with the Arizona Rules of Civil Procedure and Federal Rules of
7 Civil Procedure, even though they have no application to the instant case.⁴

8 Two more Commission Rules provide additional guidance. Commission Rule R14-3-101B
9 directs that the Commission’s Rules “shall be liberally construed to secure the just and speedy
10 determination of all matters presented to the Commission.” Commission Rule R14-3-106(E)
11 provides that “formal documents will be liberally construed and defects which do not affect
12 substantial rights of the parties will be disregarded.” To require the Division’s Notice to detail
13 each and every instance of misconduct would be beyond the clear requirement of the
14 Commission’s Rules and would not contribute to the just and speedy determination of the matters
15 presented to the Commission. Respondents’ substantial rights are not affected as the Notice more
16 than adequately informs them of the conduct at issue.

17 ***B. Arizona Rule Of Civil Procedure 9(b) Has No Application Here.***

18 For the reasons set forth above, Respondents are wrong in claiming the Division must
19 comply with Rule 9(b), Arizona Rules of Civil Procedure. In addition, Respondents fail to cite to a
20 single case where a regulator alleging fraud under its relevant securities laws in an administrative
21 forum was held to a Rule 9(b) standard. Each of the three cases cited by Respondents involved a
22 federal lawsuit by private parties alleging fraud-based claims under the civil RICO statutes or the
23

24 the Arizona Rules of Civil Procedure would still not apply. This proceeding involves a contested
25 case as that term is defined under §41-1001(4) of the Arizona Administrative Procedure Act
26 (“AAPA”), which contains a statute providing for a notice pleading. *See* A.R.S. § 41-1061(B).

⁴ “Rule 8 of the Federal Rules of Civil Procedure requires merely a short and plain statement of the
claim, rather than specific facts detailing every allegation.” *A.G. Edwards & Sons, Inc. v. Smith*,
736 F. Supp. 1030, 1032 (D. Ariz. 1989).

1 California Consumer Legal Remedies Act and California Unfair Business practice laws, thereby
2 invoking Rule 9(b) of the Federal Rules of Civil Procedure.⁵ Not one case involved an
3 administrative action brought by a regulator in an administrative forum alleging fraud under a state
4 securities law.

5 In addition, shortly after Congress enacted the Private Securities Litigation Reform Act of
6 1995 requiring that fraud alleged under the federal securities laws be pled with particularity in
7 private actions, the Arizona Legislature amended the Securities Act to incorporate a similar
8 particularity pleading requirement. *See* A.R.S. § 44-2082(A). However, the Legislature expressly
9 limited that requirement to a “private action” for alleged securities fraud. A.R.S. § 44-2082(A).
10 Private actions are brought under Article 14 of the ASA. *See* A.R.S. §§ 44-2001 to 44-2005. The
11 legislature intentionally did not extend the particularity pleading requirement to enforcement
12 actions by the Division under Article 16 of the ASA.

13 In a case such as this where approximately 192 investors purchased over 400 distinct
14 investments worth \$35 million over eleven years, Respondents’ attempt to require the Division to
15 articulate each and every instance of misconduct does not comport with the Commission’s pleading
16 standards and the liberal interpretation of the Commission’s rules.⁶ Respondents will have ample
17 opportunity to obtain witness and exhibit information prior to hearing and in sufficient time for
18 them to prepare their defense. The fact that the Notice does not state every scintilla of evidence
19 known to the Division does not preclude Respondents from proceeding.

21 ⁵ *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 405 (9th Cir.
22 1991), and *Schreiber Distribution Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir.
23 1986), both involved civil RICO claims based on alleged mail fraud. *Vess v. Ciba-Geigy*
24 *Corp. USA*, 317 F.3d 1097, 1101-02 (9th Cir. 2003), involved a civil class action alleging violations
of the California Consumer Legal Remedies Act and California Unfair Business practice laws.
Again, each of these cases was a **federal civil action** governed by Rule 9(b) of the Federal Rules of
Civil Procedure, which has no applicability to the instant case.

25 ⁶ Even if Rule 9(b) applied, the degree of specificity sought by Respondents is not required. *See*
26 *Sunbird Air Services, Inc. v. Beech Aircraft Corporation*, 789 F. Supp. 364, 365 (D. Kan. 1992)
 (“Where allegations of fraudulent conduct are numerous or take place over an extended period of
time, less specificity is required to meet the requirements of Rule 9(b)”).

1 **IV. WHETHER THE INVESTMENTS AT ISSUE ARE “SECURITIES” IS A**
 2 **QUESTION TO BE DECIDED AT THE HEARING, NOT ON A MOTION TO**
 3 **DISMISS.**

4 “Whether an instrument is a security is a question of law.” *Nutek Info. Systems, Inc. v.*
 5 *Arizona Corporation Commission*, 194 Ariz. 104, 107 ¶ 14, 977 P.2d 826, 829 (App. 1998) (citing
 6 *Vairo v. Clayden*, 153 Ariz. 13, 18, 734 P.2d 110, 115 (App. 1987), and *Daggett v. Jackie Fine*
 7 *Arts, Inc.*, 152 Ariz. 559, 564, 733 P.2d 1142, 1147 (App. 1986)). “[That] determination of the
 8 law, however, must be based on the facts determined by the fact finder - in this case the
 9 Commission.” *Nutek*, 194 Ariz. at 107 ¶ 14, 977 P.2d at 829.

10 The ASA broadly defines “security” as:

11 any note, stock, treasury stock, bond, commodity investment contract,
 12 commodity option, debenture, evidence of indebtedness, certificate of interest
 13 or participation in any profit-sharing agreement, collateral-trust certificate,
 14 preorganization certificate or subscription, transferable share, investment
 15 contract, voting-trust certificate, certificate of deposit for a security, fractional
 16 undivided interest in oil, gas or other mineral rights, real property investment
 17 contract or, in general, any interest or instrument commonly known as a
 18 “security”, or any certificate of interest or participation in, temporary or
 19 interim certificate for, receipt for, guarantee of, or warrant or right to
 20 subscribe to or purchase, any of the foregoing.

21 A.R.S. § 44-1801(23). This broad definition is substantially similar to the definition of
 22 securities in both the Securities Act of 1933 and the Securities and Exchange Act of 1934.⁷ *Nutek*,
 23 194 Ariz. at 108 ¶ 16, 977 P.2d at 830. Arizona courts therefore look to federal courts for guidance
 24 in interpreting the statute. *Vairo*, 153 Ariz. at 17, 734 P.2d at 114; *Rose v. Dobras*, 128 Ariz. 209,
 25 211, 624 P.2d 887, 889 (App. 1981).

26 “[T]he definition of a security ‘embodies a flexible rather than a static principle, one that is
 capable of adaptation to meet the countless and variable schemes devised by those who seek the
 use of the money of others on the promise of profits.’” *Nutek*, 194 Ariz. at 108 ¶ 17, 977 P.2d at
 830 (quoting *Howey*, 328 U.S. at 299). Thus, “The term ‘security’ has generally been broadly and

⁷ See Securities Act of 1933, 15 U.S.C.A. § 77(b)(a)(1) (1997); Securities Exchange Act of 1934,
 15 U.S.C.A. § 78(c)(a)(10) (1997).

1 flexibly construed to effectuate the remedial purposes of these acts, which is to protect the
2 investing public from the infinite variety of speculative or fraudulent investment schemes in which
3 the investor has no meaningful influence over the operations of the enterprise nor access to inside
4 information from which to monitor the risks of that enterprise or to protect his investment against
5 the manipulation or overreaching of insiders.” *Nagle v. Middlebury Equity Partners, LLC*, 674
6 F.Supp.2d 290, 294 (D. Me. 2009) (internal quotation omitted).

7 The Division’s Notice alleges facts that concern whether the investments at issue are
8 “securities.” *See, e.g.*, Notice at ¶¶ 9, 10 and 12. Respondents deny those allegations in their
9 respective Answers.

10 Where relevant facts that determine the legal issue of whether an investment is a “security”
11 are in dispute, as they are here, that issue cannot be decided on a motion to dismiss. *See, e.g.*,
12 *Nagle*, 674 F.Supp.2d at 294-95 (denying summary judgment because genuine issue of material
13 fact existed as to whether loan participation agreement was within the definition of a “security”
14 under the Maine Uniform Securities Act); 1 Thomas Lee Hazen, *Treatise on the Law of Securities*
15 *Regulation* § 1.6[1] (2014) (“In evaluating the sufficiency of the pleadings, the courts take a broad
16 view leaving the determination of whether the investment is a security to a later stage of the
17 litigation.”).

18 In addition, as explained above, the Division’s allegations that the investments are
19 “securities” need only meet a notice pleading standard. The Commission’s Rules do not require
20 the Division to prove its case, including the “securities” element, at this stage. That proof is the
21 purpose of the hearing.

22 Because Respondents dispute the relevant facts alleged in the Notice, and because the
23 Division does not have to present at this stage all its evidence that the investments are securities,
24 Respondents Motion should be denied.

1 **V. DISPUTED ISSUES OF FACT PRECLUDE DISMISSING MRS. WANZEK.**

2 The Motion asserts that Mr. and Mrs. Wanzek both now live in Florida and no longer have
3 an Arizona marital community. Respondents provide no evidence to support their assertion that
4 Mr. and Mrs. Wanzek both now live in Florida. The affidavit from Mrs. Wanzek that Respondents
5 attach to the Motion states that she moved to Florida in April 2010. If it is true that Mrs. Wanzek
6 moved to Florida in 2010, that does nothing to eliminate or reduce the liability of her and Mr.
7 Wanzek's marital community for the alleged securities laws violations he committed when they
8 both lived in Arizona prior to 2010.

9 Mrs. Wanzek's affidavit is conspicuously silent regarding Mr. Wanzek's residence, which
10 the Division's Notice alleges is in Arizona. In deciding the Motion, the Tribunal must assume the
11 truth of the Notice's factual allegations and credit the Division with all reasonable inferences
12 therefrom. One such reasonable inference is that Mr. and Mrs. Wanzek's Arizona marital
13 community continues to exist.

14 Public records further support the Notice's factual allegations concerning the continuing
15 existence of Mr. and Mrs. Wanzek's Arizona marital community and Mr. Wanzek's residency in
16 Arizona. The Mohave County Assessor's Office lists Mr. and Mrs. Wanzek as the owners of real
17 property located at 4081 Vega Drive, Lake Havasu City, Arizona, 86404. *See* Exhibit 1 hereto.
18 That record states that Mr. and Mrs. Wanzek hold title as "CPWRS," which is an acronym for
19 "**Community Property** With Right of Survivorship."

20 In addition, when he renewed his licensure as a certified public accountant with the Arizona
21 State Board of Accountancy for 2013-2015, Mr. Wanzek certified under penalty of perjury that he
22 resides at 4081 Vega Drive, Lake Havasu City, Arizona, 86404. *See* Exhibit 2. The Florida
23 Institute of CPAs, which serves as the association for all CPAs certified in Florida, has no listing of
24 Mr. Wanzek. *See* Exhibit 3.

25 Assuming the truth of the Notice's factual allegations and crediting the Division with all
26 reasonable inferences therefrom, as this Tribunal must do in deciding the Motion, Mrs. Wanzek

1 cannot be dismissed. At a minimum, disputed issues of material fact exist as to the continuing
2 existence and liability of Mr. and Mrs. Wanzek's marital community in Arizona that preclude
3 dismissal.

4 **VI. CONCLUSION**

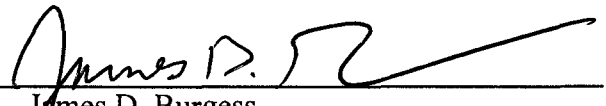
5 For all the foregoing reasons, the Division respectfully requests that Respondents' Motion
6 to Dismiss be denied in its entirety.

7 Alternatively, if the Tribunal were to determine that the Division's current series of
8 allegations should be amended or supplemented, it can order the Division to amend its Notice
9 pursuant to A.A.C. R14-3-106(E). A dismissal with prejudice would be extraordinary and
10 unwarranted.

11 RESPECTFULLY SUBMITTED this 9th day of May, 2014.

12 ARIZONA CORPORATION COMMISSION

13
14 By


James D. Burgess
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL and 8 copies of the foregoing
2 Response to Motion to Dismiss
3 filed this 9th day of May, 2014, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered
9 this 9th day of May, 2014, to:

10 The Honorable Mark H. Preny
11 Administrative Law Judge
12 Arizona Corporation Commission
13 1200 W. Washington St.
14 Phoenix, AZ 85007

15 COPIES of the foregoing sent via
16 U.S. Mail this 9th day of May, 2014, to:

17 Paul J. Roshka, Jr.
18 Timothy J. Sabo
19 Roshka DeWulf & Patten, PLC
20 One Arizona Center
21 400 East Van Buren, Suite 800
22 Phoenix, AZ 85004
23 Attorneys for ER Financial & Advisory Services, LLC,
24 Lance Michael Bersch, David John Wanzek, and Linda Wanzek

25 Alan S. Baskin
26 Baskin Richards, PLC
80 East Rio Salado Parkway, Suite 511
Tempe, AZ 85281
Attorneys for Concordia Financing Company, Ltd.

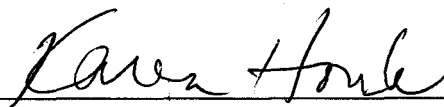


Exhibit 1

Assessor Parcel Search

Don't Know your Parcel Number?

Click to Search by Name Or Search by Address

Click for Notice of Valuation Explanation

ENTER PARCEL NO: WITH DASHES (XXX-XX-XXX)

If your Notice of Value shows the number "8" first, DO NOT enter the 8 in the box to the left.

TAX YEAR:

Parcel Information (Click for Tax Information)

Tax Year: 2014 (Click for Current Tax Bill)
Parcel Number: (Click for Map) 113-12-111 (Click for Improvement Information)
Site Address: 4081 VEGA DR
Owner: WANZEK DAVID & LINDA CPWRS
Owner 2:
Mailing Address: 4081 VEGA DR
LAKE HAVASU CITY, AZ 86404
Tax Area: 2571
Land Value: \$146,234.00
Improvement Value: \$348,898.00
Full Cash Value: \$495,132.00
Assessed Full Cash Value: \$49,513.00
Limited Value: \$442,518.78
Assessed Limited Value: \$44,252.00
Value Method: Market
Exempt Amount: \$0.00
Exempt Type:
Use Code: 0150
Property Use: 0150-SFR-010-5 STATUS UNKNWN
Class Code: Residential
Assessment Ratio: 10.00%

Last Sale Information (Click here for link to sales history prior to July 1, 2000) Any sales between July 1, 2000, and the last recorded document (below) is not shown.

MULTIPLE SALES: If a sales affidavit is recorded with one sales price for two or more parcels, we cannot make a decision on the breakdown of the price of each parcel in the sale. Our records will reflect the full sales price on each parcel. It is up to whomever is inquiring to check the sales affidavit with the Records Office (Phone: 928-753-0701) to see if the sale involves more than one parcel. If you want our records to reflect individual sales prices, then you need to be sure to record separate deeds and sales affidavits for each parcel.

Sale Price: \$199,500.00
Sale Date: 03/18/1998
Recorded Instr Type: WD
Fee Number: 1998015243

The Recorder's Office stopped using Book and Pages references on recorded documents as of January 2010. If you don't see a Book and Page reference, use the Fee Number, which will be the only reference used to acquire copies of newer recordings from the Recorder's Office.

Book:
Page:

 Printer Friendly VersionACC013380
BERSCH

Exhibit 2



**Certified Public Accountant
Registration Renewal Form**

A.R.S. §§ 32-730; 32-741(C)(D)

BOARD
COPY

Bates# 3682
Arizona State Board of Accountancy
100 N 15th Avenue, Suite 165
Phoenix, Arizona 85007-2627
(602)364-0804 8:00 AM - 5:00 PM
www.azaccountancy.gov

Registration Renewal

I hereby certify under penalty of perjury, that I have read this renewal form and know the contents thereof, that all the statements and information contained herein and in the attached forms, including all supporting documents, are true, accurate and correct in every respect, to the best of my knowledge and belief; and that I have not suppressed any information that might affect my renewal, with full knowledge that the information submitted in this renewal form may be grounds for disciplinary action against my certificate.

Signature: David J Wanzek

Residence Information

Name on Certificate: DAVID J. WANZEK

Renewal Month: February

Type of Address Residential Street

Renewal Period: 2013 - 2015

Listed Below: (residential street or, residential mailing when no residential street mail delivery is available)

Residential Street or

Residential Mailing

Address:

4081 Vega drive

(not business address)

City:

Lake Havasu city

(or equivalent)

Certificate # 9278

State or Province:

AZ

or

(or territory)

Country:

(if not United States)

ZIP or Postal Code:

86404

or

Phone:

928-453-7377

(home or cell)

E-mail:

ACC013382
BERSCH

Employment/Business**Primary Employment/Business**Do you currently work for an employer or own a business? YesEmployer/Business: David J Wanzek CPA, LLC #2783Address: 2153 mcculloch blvdCity: lake havasu city (or equivalent)State or Province: AZ or _____ (or territory)

Country: _____ (if not United States)

ZIP or Postal Code: 86403 or _____Work Phone or Cell: 928-453-7577 Ext: _____

Work E-mail: _____

In your employment with this company, do you provide any of the following services in Arizona:

- Recording and summarizing financial transactions? Yes
- Analyzing and verifying financial information? Yes
- Examining, reviewing and reporting on financial statements, reporting financial results to employer, clients or other parties? Yes
- Accounting, tax or bookkeeping service? Yes
- Rendering attestation, tax and management advisory services to an employer, clients or other parties? No
- For any of the services to which you answered "yes", was this a compensated service? Yes

From the list below, please indicate under which capacity you wish to provide these services.

Capacity under which you provide accounting services: ☐ Employee ☐ Partner ☐ Sole Practitioner/Proprietor ☐ Solely Owned PC/Limited ☐ Shareholder ☐ Member ☒ Single Member LLC/PLLC ☐ Single Partner LLP

Secondary Employment/BusinessDo you currently work for an employer or own a business? No**Contact Preferences****Address of Record**

Every registrant must have a current address of record that is available for public inspection pursuant to A.A.C. R4-1-104(B) and can be used to conduct public business. Further, pursuant to A.A.C. R4-1-346, within 30 days of any business, mailing, or residential change of address or of the opening of any new or additional office or the closing of any existing office, a registrant shall notify the Board of the new address by completing the Change of Address form or in a letter signed by the registrant.

Address: ☐ Residential Street or Residential Mailing ☒ Primary Employment/Business 2153 mcculloch blvd, lake havasu city, AZ 86403
☐ Secondary Employment/Business

Other Board Communications

As the Board modernizes, general communications will be done through your email preference. The email and phone number selected will be used solely for Board communications and will not be available to the public. To stay abreast of Board activities, you must inform the Board about any change to your email address.

E-mail: ☐ Residential Street or Residential Mailing ☒ Primary Employment/Business ☐ Secondary Employment/Business
Phone: ☐ Residential Street or Residential Mailing ☒ Primary Employment/Business 928-453-7577
☐ Secondary Employment/Business

Professional Fitness

Since your last renewal, answer each of the following questions carefully. For each yes answer, you need to write or attach a thorough explanation and include a copy of appropriate documentation (complaints, pleadings, judgements, orders, and settlement agreements).

1. Have you ever been convicted of a felony under the laws of any state or of the United States? No
2. Have you ever been convicted of any crime involving accounting or tax violations or that has a reasonable relationship to the practice of accounting by a certified public accountant or by a public accountant, including crimes involving accounting or tax violations, dishonesty, fraud, misrepresentation, embezzlement, theft, forgery, perjury or breach of fiduciary duty, or gross or continuing negligence, regardless of whether civil rights have been restored? No
3. Have you ever been found guilty of fraud or deceit in obtaining a certificate as a CPA or PA? No
4. Has any other state or foreign country for any cause other than failure to pay license or registration fees cancelled, revoked, suspended, or failed to renew your certificate or other authority to practice as a certified public accountant? No
5. Have you ever been charged with, convicted of, or entered a plea of 'no contest' or 'nolo contendere' to any of the provisions of Title 32 (Professions and Occupations) Article 6 (Arizona Board of Accountancy) or of title 44 (Trade and Commerce), chapter 12 (Sales of Securities), article 13 (Fraudulent Practices) or of any fraud provisions of the federal securities laws? No
6. Do you have any final judgments in a civil action with findings related to accounting violations, negligence in the practice of public accounting, dishonesty, fraud, misrepresentation or breach of fiduciary duty? No
7. Has a court entered a final judgment against you in a civil action, or has a governmental agency entered an order against you in an administrative proceeding, where the court or agency made a finding that you violated any fraud provisions of the laws of Arizona or federal securities laws? No
8. Have you knowingly violated any decision, order or rule issued or adopted by the Board? No
9. Have you ever been disciplined by, or has your license ever been suspended or revoked for cause by, or has your right to practice been limited by the Federal Securities Exchange Commission, the Internal Revenue Service, the Public Company Accounting Oversight Board, or any other state or federal governmental body or agency? No
10. Have you ever knowingly made any false or misleading statement or verification in support of an application for a certificate, registration or permit filed by another person? No
11. Have you ever knowingly made a false or misleading statement (a) to the Board or its designated agent, (b) on a form required by the Board, or (c) in written correspondence to the Board? No
12. Have you ever failed to respond or furnish information in a timely manner to the Board or its designated agent, if the information is legally requested by the Board in writing and is in your possession or control? No

Renewal Fee Waiver Requests

Renewal Fee Waiver - Age 65 or older

Are you requesting a waiver of the registration fee being 65 or older? No

Renewal Fee Waiver - Disability

Are you requesting a waiver of the registration fee due to disability? No

CPE Waiver Requests

CPE Waiver - Age 60 or over

Are you requesting a waiver of CPE requirements being 60 or more and not performing accounting services? No

CPE Extension - Good Cause

Are you requesting an extension of CPE requirements because of a good cause? No

CPE Waiver - Good Cause

Are you requesting a waiver of CPE requirements because of a good cause? No

Name on Certificate: DAVID J. WANZEK

Certificate # 9278

Shown in date order

| | | | | | Hours | Complete | Content |
|------------|--|---------|-------------|--|-------|--------------------------|--------------------------|
| Method: CP | Title: 2010 federal tax update | | | Sponsor: pass online | 6 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 11/17/2011 | IC: No | Ethics: | Location: self study | | | |
| Method: CP | Title: 2011 individual tax update | | | Sponsor: micromash | 8 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 12/27/2011 | IC: No | Ethics: | Location: self study | | | |
| Method: CW | Title: world's liveliest accounting update | | | Sponsor: western cpe | 6 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: A | Date: 6/11/2012 | IC: No | Ethics: | Location: orlando fl | | | |
| Method: CW | Title: critical individual tax issues in 2012 | | | Sponsor: western cpe | 6 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 6/14/2012 | IC: No | Ethics: | Location: orlando fl | | | |
| Method: CP | Title: 2011 corporate tax update | | | Sponsor: micromash | 7 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 6/21/2012 | IC: No | Ethics: | Location: self study | | | |
| Method: CP | Title: professional ethics for arizona cpa's | | | Sponsor: pass online | 4 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: E | Date: 9/19/2012 | IC: No | Ethics: Yes | Location: self study | | | |
| Method: CW | Title: american taxpayer relief act of 2012 highlights and planning considerations | | | Sponsor: cch a Wolters Kluwer business | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/15/2013 | IC: No | Ethics: | Location: seminar | | | |
| Method: CW | Title: 1120s corporation tax season filing update | | | Sponsor: cch a wolter kluwer business | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/15/2013 | IC: No | Ethics: | Location: seminar | | | |
| Method: CW | Title: business valuations-interpretations & applications | | | Sponsor: western cpe | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/16/2013 | IC: No | Ethics: | Location: group internet-based course | | | |
| Method: CW | Title: planning strategies in wake of new 3.8 medicare surtax | | | Sponsor: western cpe | 1 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/16/2013 | IC: No | Ethics: | Location: internet based course | | | |
| Method: CW | Title: auditing standards update | | | Sponsor: western cpe | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: A | Date: 1/17/2013 | IC: No | Ethics: | Location: webcast | | | |
| Method: CW | Title: stepping back from the cliff: what it means to professionals | | | Sponsor: western cpe | 1 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/17/2013 | IC: No | Ethics: | Location: webcast | | | |
| Method: CP | Title: 2012 individual tax overview | | | Sponsor: micromash | 10 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/17/2013 | IC: No | Ethics: | Location: self study | | | |
| Method: CW | Title: what does it mean to our clients that health care reform is constitutional | | | Sponsor: wesern cpe | 1 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/22/2013 | IC: No | Ethics: | Location: | | | |
| Method: CW | Title: split interest trust-charitable & non charitable | | | Sponsor: western cpe | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: T | Date: 1/23/2013 | IC: No | Ethics: | Location: | | | |
| Method: CW | Title: excel techniques for peak productivity-session 1 | | | Sponsor: western cpe | 2 | <input type="checkbox"/> | <input type="checkbox"/> |
| Subject: O | Date: 1/24/2013 | IC: Yes | Ethics: | Location: | | | |
| Method: CW | Title: the complete guide to fixed asset accounting | | | Sponsor: western cpe | 4 | <input type="checkbox"/> | <input type="checkbox"/> |

Subject: A Date: 1/24/2013 IC: No Ethics: Location:

Method: CW Title: estate planning-the new law Sponsor: western cpe 2 ☐ ☐

Subject: T Date: 1/24/2013 IC: No Ethics: Location:

Method: CW Title: excel techniques for peak productivity-session2 Sponsor: westerncpe 2 ☐ ☐

Subject: O Date: 1/25/2013 IC: Yes Ethics: Location:

Method: CW Title: ethic, leadership & the role of the CPA Sponsor: westerncpe 4 ☐ ☐

Subject: E Date: 1/28/2013 IC: No Ethics: No Location:

Method: CW Title: identifying fraud red flags Sponsor: westerncpe 2 ☐ ☐

Subject: A Date: 1/29/2013 IC: No Ethics: Location:

Method: CW Title: deciphering single audit act a-133 Sponsor: western cpe 3 ☐ ☐

Subject: A Date: 1/29/2013 IC: No Ethics: Location:

Method: CW Title: post mortem estate planning Sponsor: western cpe 2 ☐ ☐

Subject: T Date: 1/30/2013 IC: No Ethics: Location:

Only CPE marked as completed is reported (not marked as incomplete).

Completed CPE = 81

Total CPE Hours = 81

| Method Codes |
|---|
| CP - Correspondence Programs |
| CW - Classroom or Live/Interactive Webinars |
| LL - CPE Lecturer or Discussion Leader |
| P - Publishing Books/Articles |

| Subject Codes |
|---|
| A - Accounting or Auditing |
| T - Taxation |
| M - Management Advisory Services |
| B - Business Law |
| E - Ethics |
| O - Other |
| IC - Introductory computer-related course |

You are
required to
keep all
documentation
for three years
following this
registration.

Use this on-line
form only; other
spreadsheets
and formats are
not acceptable.

| Summary of CPE Hours | | |
|----------------------|----------|---|
| Actual | Required | |
| 46 | >= 16 | CW min. 16 hours A.A.C. R4-1-453(D)(5) |
| 0 | <= 40 | LL max. 40 hours A.A.C. R4-1-453(B)(4) |
| 0 | <= 40 | LL or P max. 40 hours A.A.C. R4-1-453(B)(6) |
| 0 | <= 20 | P max. 20 hours A.A.C. R4-1-453(B)(5) |
| 69 | >= 16 | A or T min. 16 hours |
| 69 | >= 40 | A, T, M or B min. 50% total CPE hours |
| 4 | <= 20 | IC max. 20 hours |
| 8 | >= 4 | E min. 4 hours, includes 1 hr. each of AICPA Professional Code of Conduct and AZ Laws/Rules A.A.C. R4-1-453(D)(6) |

Renewal Form Survey

Thank you for renewing your registration online. Please let us know what we're doing well - and more important, which areas could use more improvement. All input you provide is strictly confidential. Please rate & comment on the following:

Overall Experience: 3 (scale 1 - 5)

Ratings and comments were provided for the following sections of the renewal form:

Cover Page: (scale 1 - 5)

Personal Information: (scale 1 - 5)

Employment/Business: (scale 1 - 5)

Contact Preferences: (scale 1 - 5)

Professional Fitness: (scale 1 - 5)

Fee Waiver Requests: (scale 1 - 5)

CPE Waiver Requests: (scale 1 - 5)

CPE Tracking: (scale 1 - 5)

Exhibit 3

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Training Services

Travel Services

Video Services

Web Services

Writing Services

Other Services

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